IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

No. 846 317

FRANK G. GARDNER, as Trustee in Bankruptcy of the O'GARA COAL COMPANY,

Petitioner,

vs.

CHICAGO TITLE AND TRUST COMPANY, as Receiver of the LaSalle Street Trust and Savings Bank,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief and Argument for Respondent.

HIRAM T. GILBERT,
Counsel for Respondent.

BARNARD & MILLER PRINT, CHICAGO.

SUBJECT INDEX.

ALPHABETICAL LIST OF CASES.

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CHICAGO TITLE AND TRUST COMPANY, as Receiver of the LaSalle Street Trust and Savings Bank,
Respondent.

Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT FOR RESPONDENT.

STATEMENT OF THE CASE.

Petitioner's "Statement of the Case" is, it seems to us, somewhat too elaborate. The facts, so far as they are material, may be briefly stated as follows:

1. On September 8, 1913, the La Salle Street Trust and Savings Bank for value acquired from C. B. Munday a demand promissory note for $15,000 made by the O'Gara Coal Company dated September 6, 1913, payable to the order of C. B. Munday and by the latter endorsed, bearing interest at six per cent per annum after date and secured by collateral furnished by the O'Gara Coal Com-

pany consisting of 1,500 shares of the par value of $100 each of the capital stock of the Harrisburg-Saline Collieries Company. (Rec., 22, 23.) This collateral has ever since remained in the possession of the bank, or its receiver, no steps ever having been taken to convert it into money.

2. On October 3, 1913, the District Court, upon petition filed September 13, 1913, adjudged the O'Gara Coal Company a bankrupt and on November 11, 1913, appointed Thomas J. O'Gara, Fred A. Busse and Edward Weltman trustees, who duly qualified. Busse, one of these trustees, having died, the District Court on June 28, 1914, appointed as his sucessor William C. Niblack, who, on June 30, 1916, became sole trustee and continued to be sole trustee until his death on June 6, 1920. (Rec., 22.)

3. On various dates between November 11, 1913, and June 11, 1914, the then trustees of the bankrupt (Niblack not being one of them) deposited in the bank various sums so that when the bank suspended there stood to their credit in their deposit account on the books of the bank $19,843.62. (Rec., 23, 24.)

4. On June 12, 1914, the LaSalle Street Trust and Savings Bank, having become insolvent, suspended business and on June 18, 1914, the Circuit Court of Cook County appointed said William C. Niblack as receiver therefor and on January 18, 1915, by decree, duly dissolved it and since the appointment of the receiver it has been in process of being wound up. Niblack continued to act as such receiver until his death on June 6, 1920. (Rec., 23.)

5. On June 5, 1916, the then trustees of the bankrupt, O'Gara, Weltman and Niblack , filed in the Circuit Court of Cook County their petition for the allowonce of a preferred claim for $19,843.62 against the estate of the in-

solvent bank, but subsequently abandoned their contention for the allowance of a preferred claim and the court allowed a general claim in their favor for $19,843.62. (Rec., 24, 25.)

6. Upon this claim one dividend for $4,963.35 was paid August 14, 1916, and another dividend for $1,985.34 was paid June 18, 1918, by the receiver of the bank of the bankrupt estate. (Rec., 24.)

7. On September 11, 1914, Niblack, as receiver of the bank, filed a proof of unsecured claim against the bankrupt estate for the amount of the $15,000 note and subsequently, on August 21, 1917, filed an amended proof of secured claim for that amount but never received any dividends and no action was ever taken thereon. (Rec., 25, 26.)

Upon the foregoing facts the referee in bankruptcy, upon petition of the trustee in bankruptcy, held that they were entitled to have the $19,843.62, less the two dividends of $4,963.35 and $1,985.35, the difference being $12,894.93, set off against the amount of the $15,000 note and that upon paying the receiver this difference they were entitled to have surrendered to them the $15,000 note and the collateral. The District Court concurred in this view, but the Circuit Court of Appeals held the contrary and directed the dismissal of the petition.

BRIEF.

I.

THE RELATION OF A DEPOSITARY TO THE TRUSTEES OF A BANKRUPT ESTATE IS NOT A FIDUCIARY RELATION BUT IS SIMPLY THAT OF DEBTOR AND CREDITOR.

This point is *res adjudicata* by the decision of the Circuit Court of Cook County allowing the claim of the trustees in bankruptcy as a general claim.

There is no statute expressly making deposits of trustees in bankruptcy preferred claims, nor is there any rule of construction or other authority for holding that because depositaries are provided for by law the deposits they receive as such are to be regarded as preferred claims.

II.

AS A SECURED CREDITOR THE RECEIVER OF THE BANK OCCUPIED A POSITION ESSENTIALLY DIFFERENT FROM THAT OF AN UNSECURED CREDITOR.

The $15,000 note was secured by collateral. The claim filed by the receiver of the bank against the bankrupt estate was a secured claim. This presents an essentially different situation from that which would be presented if the claim of the bank was unsecured.

At the time of the adjudication in bankruptcy, the bank had the right to apply the collateral upon the note and present its claim against the bankrupt estate for the balance. This right could not be changed by subsequent events. The case is no different from what it would have been had the bankrupt at the time of the bankruptcy, had on deposit in the bank an amount of money equal to the value of the collateral.

III.

AT NO TIME AFTER THE INSOLVENCY AND SUSPENSION OF THE TRUST & SAVINGS BANK WAS THERE ANY RIGHT OF SET-OFF EITHER IN THE TRUST & SAVINGS BANK OR IN THE TRUSTEES OF THE BANKRUPT.

No right of set-off existed in favor of the trustees in bankruptcy as against the receiver of the Trust & Savings Bank. The right of set-off is reciprocal.

34 Cyc. 723.

In Re: United Grocery Company, 253 Fed. 267.

The authorities cited by petitioner are not in point.

The rights of the parties were absolutely fixed at the time of the suspension of the bank and they could not be subsequently changed. If there was a right of set-off at that time it was a mutual right and not a right which only one party could then avail itself of.

IV.

THE CONTROVERSY HERE IS NOT ONE BETWEEN THE O'GARA COAL COMPANY AND THE BANK, BUT IS ONE BETWEEN THE CREDITORS OF THE BANKRUPT COMPANY AND THE CREDITORS OF THE INSOLVENT BANK.

The O'Gara Coal Company and the LaSalle Street Trust & Savings Bank have ceased to exist. The sins of the Coal Company cannot be visited upon its creditors nor the sins of the Trust & Savings Bank upon its creditors. The contest here is not one between the Coal Company and the bank but is one between the two sets of creditors.

The rights of the Coal Company's creditors were fixed on the date of the filing of the petition in bankruptcy and those of the Trust & Savings Bank were fixed on the date of its suspension.

The creditors of both concerns are equally innocent victims and there would seem to be no justification for favoring one set of these creditors at the expense of the other.

V.

THE MAXIMS "HE WHO SEEKS EQUITY SHOULD DO EQUITY" AND "HE WHO COMES INTO EQUITY SHOULD HAVE CLEAN HANDS" HAVE NO APPLICATION TO THIS CASE.

William C. Niblack occupied a dual position, being not only the receiver of the bank but being also a trustee of the bankrupt estate. The bankrupt estate would not in any event be in a position to claim any advantage from an act of Niblack, receiver, which it would not have if he had not performed that act. The case, therefore, must be viewed precisely as if the receiver of the bank had not filed any claim against the bankrupt estate.

Furthermore, the claim filed by Niblack, as receiver, as amended, was not an unsecured claim but was a claim for any excess of the amount of the note over and above the value of the collateral. Payment of the excess, if any, of the amount of the note over and above the value of the collateral is the only equity which Niblack, as receiver of the bank, was seeking to enforce and was the only equity of which the court could, in any event, take cognizance.

The cases of *In re Hooper*, 175 Fed. 412, 424, and *In re Siegel-Hillman Dry Goods Co.*, 111 Fed. 986, are not in point.

VI.

THE TRUSTEES IN BANKRUPTCY ARE ESTOPPED FROM CLAIMING ANY RIGHT OF SET OFF.

The trustees in bankruptcy having obtained an order of the state court for the payment of the $19,843.62 out of the assets of the Trust & Savings Bank in due course of administration *pro rata* with the Trust & Savings Bank's other creditors and having received dividends thereon are estopped from now claiming the right to retrace their steps and pay back part of the money which they received and have their right of set-off enforced.

In re Berry, 174 Fed. 409, 98 C. C. A. 360.

Standard Varnish Co. v. *Haydock*, 143 Fed. 318, 74 C. C. A. 456.

20 Corpus Juris 32.

VII.

THIS MATTER HAS BECOME RES ADJUDICATA.

The jurisdiction of the state court was complete. The relief granted by it was entirely inconsistent with the relief now claimed by the trustee in bankruptcy and to grant the relief the trustee now claims would operate as a review of the decree of the state court by the courts of the United States. This cannot be permitted.

ARGUMENT.

I.

THE RELATION OF A DEPOSITARY TO THE TRUSTEES OF A BANKRUPT ESTATE IS NOT A FIDUCIARY RELATION BUT IS SIMPLY THAT OF DEBTOR AND CREDITOR.

This point was submitted to and decided by the Circuit Court of Cook County when it passed upon the petition of the trustees in bankruptcy for the allowance of a preferred claim against the insolvent bank. (Rec., 6-7.) It allowed the claim as a general claim. The trustees accepted this general claim and received dividends on it. (Rec., 6.) The question, therefore, is *res adjudicata*.

It is not claimed that the deposits made by the trustees in bankruptcy were special deposits, the precise money deposited to be retained and returned to the depositors when demanded. The bank was expected to mingle the deposits with its other funds and to have the right to use these funds for its banking purposes. Otherwise why should it go to the trouble and expense of furnishing a bond to secure the trustees in bankruptcy against loss? Obviously, it gave the bond in order that it might have the use of the funds for banking purposes until they were called for. Hence the relation between the trustees in bankruptcy and the bank was merely that of debtor and creditor.

To give a deposit the character of a preferred claim it must be expressly or impliedly declared such by statute, or it must be capable of identification or segregation from the bank's other funds. There is no statute expressly making deposits of trustees in bankruptcy pre-

ferred claims, nor is there any rule of construction or other authority for holding that because depositaries are provided for by law the deposits they receive as such are to be regarded as preferred claims.

There is nothing, we submit, in the 27 pages of argument by the petitioner (22-48) which requires further answer on our part.

II.

AS A SECURED CREDITOR THE RECEIVER OF THE BANK OCCUPIED A POSITION ESSENTIALLY DIFFERENT FROM THAT OF AN UNSECURED CREDITOR.

The fact must not be overlooked that the note for $15,000 which the bank held was secured by collateral and that the claim which its receiver filed against the bankrupt estate, though originally framed as an *unsecured* claim, was, as subsequently amended, a *secured* claim. Upon this claim no action had ever been taken by the bankruptcy court and all that the receiver of the bank could receive from the bankrupt estate was the amount of the dividends which might be paid upon the excess, if any, of the amount of the note over and above the value of the collateral.

Assuming, for the purposes of the argument, that if the claim of the receiver of the bank had been unsecured the right of set-off would have existed in favor of the trustees of the bankrupt (an assumption which, we submit, is unwarranted), is not an essentially different situation presented by the circumstances that the bank held collateral security for its note?

Of course, if the bank had held no collateral at the time of the adjudication of bankruptcy it could thereafter have done nothing towards securing the payment of the note other than filing its claim against the bankrupt estate and

receiving such dividends thereon as might be declared. It could not have applied in payment of the note any of the money deposited with it by the trustees in bankruptcy. But, having collateral security, it was entitled to convert that security into money and apply the proceeds in payment of the note.

If, then, at any time after the trustees had made their deposits and prior to June 12, 1914, the bank had seen fit to convert the collateral into money and apply the proceeds in satisfaction or part satisfaction of the note it would have acted strictly within its rights. If the proceeds of the collateral paid the entire note the bank would have had no claim against the bankrupt estate and the bankrupt estate would have had no claim against the bank excepting for the amount of the deposit account and for the surplus, if any, of the proceeds of the collateral over and above the amount due upon the note. If the proceeds of the collateral were insufficient to pay the note, the bank would have had a claim for the deficiency against the bankrupt estate and the bankrupt estate would have had a claim against the bank for the amount of its deposit account.

Does the fact that the bank was indulgent to the bankrupt estate and neglected to avail itself of its right to convert the collateral into cash and apply the proceeds on the note change the situation so far as concerns the respective rights of the bankrupt estate and the insolvent bank?

We submit that it does not. The receiver of the bank succeeded to all its rights and was authorized to do in respect to this matter whatever the bank could have done.

The collateral which the bank held was *means* of payment which should be treated the same as if it were *actual* payment. In effect the situation was no different from

what it would have been had the bankrupt, at the time of the bankruptcy, had on deposit a sum of money equal to the value of the collateral. The fact that the collateral was not actually applied in payment of the note could not change the respective rights of the parties. *The bank's right to apply the value of the collateral upon the note became absolute at the time of adjudication in bankruptcy and it could not be changed by subsequent events.*

If, therefore, there was any right of set-off in the bankrupt estate as against the insolvent bank, which we respectfully deny, it could in no event be extended further than the excess, if any, of the amount of the note over and above the value of the collateral.

III.

AT NO TIME AFTER THE INSOLVENCY AND SUSPENSION OF THE TRUST AND SAVINGS BANK WAS THERE ANY RIGHT OF SET-OFF EITHER IN THE TRUST AND SAVINGS BANK OR IN THE TRUSTEES OF THE BANKRUPT.

Leaving out of consideration the fact that the trustees of the bankrupt procured the allowance by the Circuit Court of Cook County of their claim against the Trust & Savings Bank and received dividends thereon it is submitted that no right of set-off existed in favor of the trustees in bankruptcy as against the receiver of the Trust & Savings Bank.

In 34 Cyc. 723, it is said:

> "Courts of equity usually follow the law in matters of set-off, in the absence of any intervening equity, and thus where there are cross demands between two parties of such a nature that if both are recoverable at law they would be the subject of legal set-off, then if either of the demands is a matter of equitable jurisdiction the set-off will be enforced in equity. *But it is held as a general rule that in*

equity, as at law, the right of set-off is reciprocal and only mutual claims and such as are in the same right can be set-off."

The general rule thus stated is so well settled that it would serve no useful purpose to cite adjudged cases in its support. The right of set-off being, as a general rule, reciprocal, and it being perfectly clear that neither the Trust & Savings Bank, while it was a going concern, nor its receiver, after it became insolvent, could have successfully claimed the right to set-off the amount due upon the O'Gara Coal Company's note against the deposit made by the trustees in bankruptcy, it is necessary to inquire whether there are any circumstances in this case which would take it out of the operation of the general rule thus laid down.

In *In Re United Grocery Company*, 253 Fed. 267, the facts were as follows:

On January 4, 1917, the United Grocery Company was adjudicated a bankrupt. Subsequently trustees were duly elected by the creditors and appointed by the referee. On the date the company was adjudicated a bankrupt it was indebted to the Heard National Bank in the sum of $30,482.47. The Heard National Bank closed its doors on January 16, 1917, and in due course a receiver to wind up its affairs was appointed by the comptroller of the currency. Between the 4th and the 16th of January, 1917, the receiver of the bankrupt deposited with the Heard National Bank, to his credit as receiver, various amounts which aggregated, after the payment of certain checks against the deposit, the sum of $7,586.04. On January 19, 1917, the receiver of the Heard National Bank filed his proof of claim before the referee for $30,480.47. An order having been made for a re-examination of the proofs of the bank's claim, the referee, on

October 31, 1917, entered an order allowing the bank's claim in the sum of $30,480.47 upon the payment to the trustee by the receiver of the bank of $7,586.04 deposited by the receiver of the bankrupt in the bank prior to January 16, 1917, after his appointment on January 4, 1917. Upon a petition for a review being filed, Call, District Judge, among other things, said:

"There is no dispute as to the facts. It is unquestioned that the bankrupt, on the date of the adjudication on January 4th, was indebted to the bank in the sum of $30,480.47, nor is it questioned that the receiver of the bankrupt deposited in a general checking account with the bank, between January 4th and 16th, the $7,586.04, nor that the bank closed its doors on January 16th, and a receiver was duly appointed by the comptroller to wind up its affairs and make distribution of its assets according to the laws governing such cases. The decision of the question seems to me to depend upon whether the right to a set-off, either at law or in equity, exists under these facts. As I understand the Bankruptcy Act and the decisions of the courts, neither the bank nor its receiver could have applied this deposit to payment of the debt owed the bank by the bankrupt nor the trustees of the bankrupt apply this deposit to the discharge *pro tanto* of the debt to the bank, because there is a want of mutuality in the demands, and because, as I understand the law and the adjudicated cases, upon the bankruptcy of an individual, or the insolvency of a national bank and appointment of a receiver to wind up its affairs by the comptroller, the creditor becomes an equitable *cestui que trust* in the assets in the proportion that his claim bears to the total amount of the claims, and his right to participate in the dividends arising from such assets may not be diminished by claims arising subsequently to the bankruptcy or insolvency. This right to participate is determined as of the date of bankruptcy or insolvency. The bank's right to participate in the dividends from the bankrupt's estate matured certainly on January 4th, when the adjudication was made, and the right of the trustees to

participate in the dividends of the assets of the bank matured on January 16th, when the comptroller took charge of the affairs of the bank, and this right could not be taken from the bank's receiver by the subsequent deposit of moneys in the bank to a general account, to which no trust was affixed, and which created simply the relation of debtor and creditor between itself and the depositor.

The fact that the bankrupt may pay in full its creditors, and the bank may not be able to do so, can not change the principles of law. It may work an apparent hardship in the particular case, but all general rules sometimes do that. I am of opinion, therefore, that the order of the referee should have reallowed the claim of the receiver of the bank in the full amount allowed conditionally.

The petition to review will therefore be granted, and the order of the referee modified accordingly."

It is insisted in behalf of the trustees in bankruptcy, that the foregoing decision was erroneous and to support this contention a number of authorities are cited, and, among them, *People* v. *California Safe Deposit and Trust Company*, 168 Cal. 241, 141 Pac. 1181; *In re Harper*, 175 Fed. 412; *In re Siegel-Hillman Dry Goods Company*, 111 Fed. 980, 986; *Scott* v. *Armstrong*, 146 U. S. 499, and *In re Chrystal Spring Bottling Company*, 100 Fed. 265.

In *People* v. *California Safe Deposit & Trust Company*, 168 Calif. 241, 141 Pac. 1181, which is relied upon by petitioner to justify the allowance of the set-off, the facts were these:

Thomas Bell died testate in October, 1892. At the time of his death he was indebted to the California Safe Deposit & Trust Company on a promissory note for $40,000. The Trust Company presented a claim against the estate on this note and it was allowed. Afterwards payments were made by the estate on the claim until on December 19, 1907, there was a balance due of $10,093.40 with interest thereon at 6 per cent per annum from April 23,

1898. On February 13, 1902, on application of the administratrix of the estate an order of court was made appointing and designating the Trust Company as the depositary of the funds of the estate and ordering and directing the administratrix to deposit with it all the moneys of the estate. The Trust Company accepted the appointment and thereafter acted as such depositary until it became insolvent and ceased to do business. The administratrix, after the making of the order, had deposited from time to time with the Trust Company funds of the estate so that she had on deposit with the Trust Company on December 19, 1907, when it became insolvent and ceased to do business a sum of money, funds of the estate, exceeding $20,200, no part of which had been paid to the administratrix. The estate of Bell was solvent so that there never was any time any question but that the claim of the Trust Company would be paid in full.

Such being the facts the question presented was whether the administratrix was entitled to set-off, in payment of the balance due from the estate to the insolvent Trust Company, sufficient for that purpose of her deposit in the Trust Company. The court held she was entitled to avail herself of the set-off. After referring to certain cases in which the right of set-off had been denied and to a few exceptional cases in which it had been allowed, the court said:

> "We can perceive no reason why the principles of the decisions cited should not be applied to the demands here. We think it should, and that, *notwithstanding the respective demands are not mutual, still, if any proceeding in the estate had been taken by the bank to collect its allowed claim prior to its insolvency, or the administrator had theretofore sued to collect the estate funds on deposit with it, the estate being solvent, the demand of one party would have been available as a set-off against the claim of the other; that the right of the parties in that re-*

spect were reciprocal, and, as we have said, the insolvency of the bank did not affect the right of either to have this subsequently done.''

After some further discussion the court said:

> ''Applying these views to the respective demands of the parties here, we are satisfied that the facts stated in the petition in intervention show that a right of set-off between these demands could have been asserted by either of them *if any proceeding or action had been brought by the one against the other at the time of the insolvency of the bank; that this right was reciprocal;* and that a sufficient cause for the relief asked by the administratrix was shown in her petition for intervention.''

It will be seen from the facts stated in the opinion of the court that Bell's estate was and always had been solvent and that accordingly no injustice would have been done to any of its creditors or other persons interested therein if the moneys of the estate which the administratrix deposited with the Trust & Savings Bank, instead of being so deposited, had been paid to the Trust Company in payment of the indebtedness to it of Bell's estate. If, therefore, there was any absence of mutuality in the situation it was purely technical. The court in its opinion asserted

> ''that a right of set-off between these demands could have been asserted by either of them (*i. e.*, either of the parties) *if any proceeding or action had been brought by the one against the other at the time of the insolvency of the bank.''*

That was not the situation in the case now before the court. The receiver of the bank, when he took possession of its assets, could not have maintained a right to have the amount due upon the note of the O'Gara Coal Company set off against the $19,843.62 which the trustees in bankruptcy had on deposit in the Trust & Savings Bank at the time it suspended. His only right at that

time was to convert into cash the collateral which he held and apply it upon the note. On the other hand the trustee of the bankrupt estate of the O'Gara Coal Company would not have been permitted by the bankrupt court to consent to any set-off of the $19,843.62 or any part of it against the note, even if the receiver of the Trust & Savings Bank had asked for it, without a showing that the allowance of such set-off would be in the interest of the creditors of the bankrupt, for this deposit might have been the only asset of the bankrupt estate available for the payment of the O'Gara Coal Company's debts and the expenses of the administration of the banking estate.

Clearly, then, there is nothing in this California case which supports the contention of the trustee in bankruptcy that there could have been a set-off allowed at any time after the suspension of the Trust and Savings Bank.

In *In Re Harper*, 175 Fed. 412, the decision of the court was merely that a trustee in bankruptcy might set up as a set-off against a claim filed by a creditor a claim of unliquidated damages existing in favor of the bankrupt against such creditor which passed to the trustee, and which, under the law of the state, the bankrupt, but for his bankruptcy, might have pleaded as a counter claim in the action by the creditor, and the trustee might have such claim liquidated by the referee, unless some other mode of liquidation were directed.

It is apparent that that case has no similarity to the one now before the court. The demands of both parties were subsisting demands at the time of the bankruptcy and the right of set-off was then an existing right.

In *In Re Siegel-Hillman Dry Goods Company*, 111 Fed. 980, 986, the facts were as follows:

A bank held notes of a corporation, endorsed before

delivery by a partnership, which thereby became liable as a joint maker. A short time before the corporation became bankrupt, and while insolvent, it made a payment on the note, which was received by the bank in the usual course of business, and without notice actual or constructive of the corporation's insolvency. After the bankruptcy the endorser paid the remainder due on the notes. Both the bank and the partnership held other large claims against the bankrupt estate.

Upon the foregoing facts the court held that if the bank was required, under the provisions of the bankruptcy act, to surrender the payment received from the corporation as a condition precedent to proving its remaining claims against the estate, the effect would be to leave the notes to that extent unpaid, and a subsisting liability not only of the estate, but also, in equity, of the partnership, as endorser, and that the court of bankruptcy, in the exercise of its power to adjust the equities between such creditors, would transfer the obligation to surrender the amount of such payment from the bank to the partnership as a condition to the proving of its remaining claims, the circumstances of the particular case being such that the rights of general creditors would not be affected thereby.

It thus appears that the claims in question were claims which were in existence at the time of the bankruptcy and that to enforce equity as between the parties would not in any manner prejudice the rights of the general creditors of the bankrupt.

In *Scott* v. *Armstrong*, 146 U. S. 499, the court held that a customer of the National Bank, who in good faith borrowed money of the bank, gave his note therefor due at a distant date, and deposited the amount borrowed to be drawn against, any balance to be applied to the pay-

ment of the note when due, had an equitable (but not a legal) right, in case of the insolvency and dissolution of the bank and the appointment of a receiver before the maturity of the note to have the balance to his credit at the time of the insolvency applied to the payment of his indebtedness on the note.

There, too, the claims which were the subject of the right of set-off were existing claims at the time of the insolvency of the bank.

In *In re Chrystal Springs Bottling Company*, 100 Fed. 265, the facts as stated by the district judge were as follows:

Five persons, only one of whom was solvent, had a joint claim against the estate of the bankrupt, and each of them had severally become liable to the trustees in bankruptcy, the amounts of such liabilities aggregating more than the claim, but it did not appear that the joint liability and the separate debts grew out of the same transaction, or that either formed the inducement or consideration of the other.

Such being the facts, the court held that there could be no set-off of such claims, and that the trustee's motion to expunge the proof of claim by the creditors must be denied, though without prejudice to any rights the parties might have, and for the declaration of a dividend. The district judge in delivering his opinion, said:

> "The set-offs provided for in the bankrupt act are in 'cases of mutual debts or mutual credits, between the estate of a bankrupt and the creditor.' Sec. 68a. This would seem to include a liability that has accrued to a trustee which had not accrued to the bankrupt, when the claim and liability are mutual."

Of course this was *obiter dictum*. However, conceding it to be a correct statement of the law, it would have no application to the case now before the court. While

there four of the claimants were insolvent they were not in bankruptcy and consequently there was no question as to the rights of their respective creditors. To have allowed a set-off would have worked no injustice to them. It would have been otherwise had their estates been in process of distribution in the court of bankruptcy.

The other authorities cited by petitioner merely lay down the proposition that a court of equity may, under exceptional circumstances, allow a set-off which would not be allowed in an action at law. They present no example of a set-off under circumstances similar to those presented in the case now under consideration.

The contention of petitioner seems to be that the bankrupt estate's right of set-off possessed the peculiarity that it could be reserved and held in suspense and availed of or not availed of as might at any time after the bank's insolvency appear to be to the interest of the bankrupt estate. In other words, while the receiver of the bank could not enforce any right of set-off, the bankrupt estate could keep its right of set-off in suspense indefinitely until circumstances enabled it to decide whether it was advantageous to use it or not.

No authority is cited to support any such proposition. The rights of the parties were absolutely fixed at the time of the suspension of the bank and they could not be subsequently changed. If there was a right of set-off at that time it was a mutual right, and not a right which only one party could then avail itself of.

IV.

THE CONTROVERSY HERE IS NOT ONE BETWEEN THE O'GARA COAL COMPANY AND THE BANK BUT IS ONE BETWEEN THE CREDITORS OF THE BRANKRUPT COMPANY AND THE CREDITORS OF THE SOLVENT BANK.

Petitioner insists that the receiver of the bank has no greater rights than the bank itself would have had. To support this proposition it cites *Republic Life Insurance Company* v. *Swigert*, 135 Ill. 150. That decision is not applicable to the case of a receiver of an insolvent bank. Such a receiver not only represents the bank, but also represents the creditors and can assert any claim which the creditors themselves could enforce. *Golden* v. *Cervenka*, 278 Ill. 409.

Both the O'Gara Coal Company and the La Salle Street Trust and Savings Bank have ceased to existt, the former by the adjudication in bankruptcy and the latter by the appointment of the receiver and the decree off dissolution. The sins of the Coal Company cannot be viisited upon its creditors nor the sins of the Trust and Sawings Bank upon its creditors. The question here is, what are the respective rights of these two sets of creditors with respect to the funds of the two estates? The rights of the Coal Company's creditors were fixed on the date of the filing of the petition in bankruptcy and those of the Trust and Savings Bank were fixed on the date of its suspension.

It was, of course, unfortunate for the creditors of the Coal Company that the Trust and Savings Bank should fail, but it was likewise unfortunate that the Coal Company should become bankrupt, *and that, too, only five days after the Trust and Savings Bank had cashed its note for* $15,000. Perhaps if the O'Gara Coal Company

had not become bankrupt the Trust and Savings Bank might not have failed. In any event the delinquency of the Coal Company must have contributed to the suspension of the Trust and Savings Bank.

The creditors of both concerns are equally innocent victims and there would seem to be no justification for favoring one set of their creditors at the expense of the other.

V.

THE MAXIMS "HE WHO SEEKKS EQUITY SHOULD DO EQUITY" AND "HE WHO COMES INTO EQUITY SHOULD HAVE CLEAN HANDS" HAVE NO APPLICATION TO THIS CASE.

The authority of the bankruptcy court to adjudicate upon the right of set-off is based—by the petitioner—upon the proposition that the receiver of the bank has voluntarily come into that court and invoked its aid. The petitioner does not claim, and, we submit, could successfully claim, that if the receiver of the bank had not voluntarily come into the bankruptcy court and invoked its aid that court could have assumed jurisdiction to allow a set-off. It is therefore proper to consider how it happened that the receiver of the bank came into bankruptcy court and the manner and purpose for which he came in. This is a proper inquiry to be made in determining the rights of the depositors of the bank whom the receiver of the bank has assumed to represent.

As is pointed out in the preceding statement of facts (*ante*, p. 2) William C. Niblack occupied a dual position, being not only the receiver of the bank but being also a trustee of the bankrupt estate. It is plain, therefore, that the bankrupt estate would not in any event be in a position to claim any advantage from an act of Niblack as receiver which it would not have if he had not

performed that act. In other words, Niblack as trustee of the bankrupt estate was not in a position to assert any right against the creditors of the Trust and Savings Bank because of an act performed by him as receiver of the bank. The case, therefore, must be viewed precisely as if the receiver of the bank had never filed any claim against the bankrupt estate.

Furthermore, while Niblack, as receiver of the bank, originally filed against the bankrupt estate a proof of unsecured claim he subsequently amended his proof so as to make it a proof of a secured claim, or, in other words, a claim for any excess of the amount of the note over and above the value of the collateral. After having so amended his proof of claim he took no action upon it and in no manner invoked the aid of the court. So far as his claim as receiver of the bank is concerned it is no different from what it would be if the collateral had been disposed of and the claimant were seeking merely payment of a deficiency in the value of the collateral over and above the amount of the note. Payment of the excess, if any, of the amount of the note over and above the value of the collateral is the only equity which Niblack, as receiver of the bank, was seeking to enforce and was the only equity of which the court could in any event take cognizance.

In support of his contention that the court of bankruptcy acquired the right to enter the decree it did enter because the receiver of the bank filed his secured claim against the bankrupt estate the petitioner cites *In re Harper*, 175 Fed. 412, 424, and *In re Siegel-Hillman Dry Goods Co.*, 111 Fed. 986. Those cases are not in point. In each of those cases the claimant was in court seeking to enforce an unsecured claim against the bankrupt estate while here the receiver of the bank, if in court at all, is merely seeking payment of the excess, if any, of the

amount of the $15,000 note over and above the value of the collateral.

Of course, if Niblack, *as receiver of the bank*, had not filed any claim in behalf of the insolvent bank in the bankruptcy proceedings, it could not be pretended that the bankrutpcy court could have brought him into the bankruptcy proceedings at the instance of Niblack, *as trustee in bankruptcy*, and adjudicated upon the rights of the insolvent bank. Would, therefore, the court in any event, hold that Niblack, *as trustee in bankruptcy*, might gain an advantage for the benefit of the creditors of the bankrupt estate over the creditors of the insolvent bank by giving the bankruptcy court jurisdiction over himself *as receiver of the bank?*

We venture to assert that law libraries may be searched in vain for a precedent authorizing one who happens to be a trustee of two distinct estates to take a voluntary step by which one estate is given, as against the other estate, a right which, but for such step, it would not possess.

It is true this point was not discussed by the Circuit Court of Appeals, but that is immaterial. The Circuit Court of Appeals has entered a judgment in favor of the receiver of the insolvent bank. The question here now is whether that judgment was right under the facts shown by the record. If it was right, it cannot be disturbed, because the court may have given a wrong reason for its conclusion. Regardless of what occurred in the Circuit Court of Appeals the respondent is entitled to urge any reason justified by the record why the judgment of that court should not be disturbed.

VI.

THE TRUSTEES IN BANKRUPTCY ARE ESTOPPED FROM CLAIMING ANY RIGHT OF SET-OFF.

Even if the trustees in bankruptcy subsequent to the insolvency of the bank were in a position to assert a right of set-off they lost that right through their subsequent conduct.

In June, 1916, nearly two years after the Trust & Savings Bank suspended, when, according to the present contention of appellee, the trustees in bankruptcy might have presented their petition in the bankruptcy proceeding and secured an order setting off so much of the deposit account of $19,843.62 against the $15,000 note of the O'Gara Coal Company as was necessary to satisfy it, they voluntarily entered their appearance in the state court and sought and obtained an order of that court for the payment in full of the $19,843.62 out of the assets of the Trust & Savings Bank in due course of administration pro rata with the Trust and Savings Bank's other creditors. They expressed no willingness to have the amount of the O'Gara Coal Company note set-off against their claim. They were quite willing to have the receiver of the Trust & Savings Bank pay their claim in full, if the assets of the Trust & Savings Bank were sufficient for that purpose, and leave the receiver of the Trust & Savings Bank to take his chances of collecting the $15,000 note out of the O'Gara Coal Company's assets, or out of the collateral, with the possible result that the trustees in bankruptcy might obtain full payment or nearly full payment of their claim and the receiver of the Trust & Savings Bank might not be able to obtain anything on his claim.

Of course, when the O'Gara Coal Company went into bankruptcy the coal business was not very prosperous and

very likely it did not appear to be very prosperous wh
the trustees in bankruptcy concluded to take their chan
of getting payment of the $19,843.62 out of the assets
the Trust & Savings Bank and leave the receiver of t
Trust & Savings Bank to get what he could out of t
assets of the O'Gara Coal Company or out of the c
lateral.

Since, however, the coal business has picked up a
the O'Gara Coal Company's financial affairs have grea
improved and it is to the interest of the trustees in ba
ruptcy to now claim the right of set-off, they wish to
trace their steps and do what they now claim they mig
have done at any time.

Would it be just to the other creditors of the Trus
Savings Bank to allow the right of set-off to be now a
serted? We submit that it would not, but that justi
requires that the trustee in bankruptcy should be he
bound by the election thus made and acted upon.

A peculiar feature of this situation must not be ov
looked and that is that the trustee in bankruptcy, by a
cepting the dividends from the estate of the insolve
Trust and Savings Bank, received several thousand d
lars more than, according to his present contention,
was entitled to. This money he has wrongfully retain
more than four years and now finds it necessary to pay
back in order to obtain the relief to which he claims to
entitled. That he did not get still more than he n
claims to be entitled to is not his fault, but has result
from the fact that no further dividends have been pa
by the receiver of the Trust and Savings Bank.

If there ever was a case where the doctrine of estopp
was applicable, it is submitted that this is one. It woul

seem to be a clear case of election of remedies which is binding upon the party making the election.

In re Berry, 174 Fed. 409; 98 C. C. A. 360.

Standard Varnish Works v. *Haydock*, 143 Fed. 318; 74 C. C. A. 456.

20 Corpus Juris 32.

VII.

THIS MATTER HAS BECOME RES ADJUDICATA.

Apart from the objection of estoppel, it is submitted that this matter has become *res adjudicata* by the decree of the Circuit Court of Cook County. The jurisdiction of that court over the controversy was as complete as would have been the jurisdiction of the United States District Court had the jurisdiction of the latter been invoked by the trustees in bankruptcy instead of their proceeding in the state court. The relief granted by the state court was entirely inconsistent with the relief now claimed by the trustee in bankruptcy, and hence to grant the relief the trustee now claims would operate as a review of the decree of the state court by the United States District Court and that, too, after the decree of the state court has been partly carried into execution. This, it is respectfully submitted, cannot be permitted.

VIII.

CONCLUSION.

The contentions of the respondent may, therefore, be summarized as follows:

First. The bank, or its receiver, had the right at any time after adjudication in bankruptcy to convert the collateral into money and apply the proceeds in payment, or partial payment, of the note.

Second. That which the bank or its receiver had the right to do after the adjudication must, for the purpose of determining the rights of the parties in this proceeding, be treated as having been done.

Third. The situation would not be different, from a legal standpoint, from what it would have been, if, at the time of the adjudication in bankruptcy, the value of the collateral had been on deposit in the bank to the credit of the bankrupt, in which case it would have been applied as a credit upon the note.

Fourth. If the bankruptcy court had jurisdiction of the case it could only deal with it as one involving the right of the bankrupt estate to set-off its claim against the balance due upon the note after applying thereon the value of the collateral.

Fifth. The bankruptcy court had no jurisdiction to determine the question of set-off because Niblack, as receiver of the bank, had no right to enter his appearance in the bankrupty court for the purpose of enabling himself, as trustee of the bankrupt estate, to enforce a claim against himself as receiver of the bank which could not have been enforced by the bankruptcy court had he not so entered his appearance.

Sixth. Even if the claim of the receiver of the bank

had been an unsecured claim and the bankruptcy court had had jurisdiction of the matter of set-off, the claim of the bankrupt estate could not have been set off against the note, the right of set-off not being mutual and reciprocal.

Seventh. The proof by the trustees in bankruptcy of their claim in the state court, its allowance by that court as a general claim and the acceptance by the bankrupt estate of dividends thereon are a bar to any proceeding for the enforcement of a right of set-off.

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